

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

**MICHAEL SHANE GRAHAM and
DANA GRAHAM,**

Plaintiffs,

vs.

ALL STRONG INDUSTRY, INC., et al.,

Defendants.

)
)
)
)
)
)
)
)
)
)
)

CAUSE NO. 1:04-cv-615-JDT-WTL

ENTRY ON PLAINTIFFS' MOTION TO RECONSIDER

This cause is before the Court on the Plaintiffs' Motion to Reconsider its order granting Defendants Ching Feng Industry (USA), Inc., and Ching Feng Home Fashions, LTD, (collectively "Ching Feng Defendants") leave to amend their answer to assert the affirmative defense of lack of personal jurisdiction. Inasmuch as the motion to amend inadvertently was granted without giving the Plaintiffs the opportunity to respond, the motion to reconsider is **GRANTED**. Having now considered the Plaintiffs' arguments with regard to the Ching Feng Defendants' motion to amend and the Ching Feng Defendants' response to those arguments, the Court **DENIES** the motion to amend for the reasons set forth below. The Ching Feng Defendants' amended answer (dkt #113) is **ORDERED STRICKEN**, and their pending motion to dismiss will be considered only with regard to their insufficiency of service of process argument.

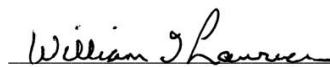
As the Plaintiffs correctly note, a defendant's ability to raise the defense of lack of personal jurisdiction is governed by Federal Rule of Civil Procedure 12(h)(1), which provides that such a defense is waived unless it is raised in the defendant's initial motion to dismiss or, if no such motion is made, "included in a responsive pleading or an amendment thereof permitted

by Rule 15(a) to be made as a matter of course.” Rule 15(a), in turn, provides that a party may amend its answer once as a matter of course “at any time within 20 days after it is served.”

In this case, the Ching Feng Defendants filed their answer to the amended complaint on June 30, 2006; their motion to amend their answer was not filed until July 31, 2006, more than 20 days later. Therefore, the Plaintiffs correctly argue that pursuant to the above-cited rules the Defendants waived their defense of lack of personal jurisdiction and should not have been granted leave to assert that defense. The Defendants argue that they are saved by the fact that on July 24, 2006, the parties filed a joint motion to amend certain case management plan deadlines, in which they agreed that the Defendants would have 40 days to amend their answers without leave of court. The problem with that argument is that by the time that motion was filed, the Defendants already had waived their lack of personal jurisdiction defense, and that waiver could not be undone by a general motion to extend case management deadlines.

Upon reconsideration, the Defendants’ motion to amend their answer is **DENIED**. The Plaintiffs shall file a notice **within 5 days of the date of this Entry** setting forth what, if any, of the discovery they seek in their Motion for Leave to Conduct Limited Discovery is still necessary in light of this ruling, and whether their response to the motion to dismiss for insufficient service of process is complete. The Defendants’ deadline for filing their reply in support of that motion is **STAYED** until further order of the Court.

SO ORDERED: 10/16/2006



Hon. William T. Lawrence, Magistrate Judge
United States District Court
Southern District of Indiana

Copies to:

Timothy E. Congrove
SHOOK HARDY & BACON LLP
tcongrove@shb.com

James Thomas Corrigan
ONDER SHELTON O'LEARY & PETERSON LLC
corrigan@onderlaw.com

Donald L. Dawson
KIGHTLINGER & GRAY
ddawson@k-glaw.com

Jennifer Marie Herrmann
KIGHTLINGER & GRAY
jherrmann@k-glaw.com

James George Onder
ONDER SHELTON O'LEARY & PETERSON, LLC
onder@onderlaw.com

Jason E. Pepe
SHOOK HARDY & BACON LLP
jpepe@shb.com

William R. Sampson
SHOOK HARDY & BACON LLP
wsampson@shb.com

Thomas R. Schultz
SCHULTZ & POGUE LLP
tschultz@schultzpoguelaw.com

William E. Winingham
WILSON KEHOE & WININGHAM
winingham@wkw.com

D. Bryce Zoeller
KIGHTLINGER & GRAY
bzoeller@k-glaw.com